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No. 95-1613

In the Supreme Court of the United States

OCTOBER TERM, 1995

LUTHER C. PERKINS, PETITIONER

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the failure of petitioner's counsel to file petitioner's age discrimination complaint in time provides a basis for equitable tolling of the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 70 F.3d 1252 (Table). The opinion of the district court (Pet. App. A3-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1995. The petition for a writ of certiorari was filed on February 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was hired in July, 1988, by the Veterans Administration (VA) as Chief of Pharmacy at its Medical Center in Castle Point, New York. Pet. App. A6. In February, 1989, the VA reclassified the position of Chief of Pharmacy, which made petitioner eligible for a promotion and pay increase. *Id.* at A21. Petitioner did not receive a promotion, however, and he alleges that the decision not to promote him was based on his age, which was 64 at the time. *Id.* at A8.

On January 24, 1991, petitioner filed an employment discrimination complaint with the VA, alleging that the failure to promote him violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* On February 18, 1993, the VA denied petitioner's claim, finding that there had been no discrimination. On March 18, 1993, petitioner appealed the VA's final decision to the Equal Employment Opportunity Commission (EEOC). The EEOC affirmed the VA's decision on September 21, 1993. Pet. App. A8, A10, A21. Petitioner received notice of the EEOC's decision on September 23, 1993. Pet. 3. Under the ADEA, petitioner was required to file a judicial action within 90 days after receiving notice of the EEOC decision, or by December 22, 1993. See 29 U.S.C. 626(e).

Following the EEOC's decision, petitioner contacted Daniel Cochran, an attorney in East Kingston, New Hampshire. Cochran allegedly assured petitioner that he would file a complaint on petitioner's behalf, but he failed to do so. Pet. App. A11. After petitioner became aware that no complaint had been filed, he filed a *pro se* age discrimination complaint in district court, on July 8, 1994. *Ibid.*

The VA moved to dismiss the case on the ground that the complaint, filed seven and one-half months after the expiration of the limitation period imposed by 29 U.S.C. 626(e), was untimely. The district court dismissed the case and stated that, although petitioner's failure to file a timely claim "resulted solely from the gross error of [petitioner's] attorney," the case did not warrant equitable tolling of the statute of limitations under the "narrow view of the doctrine" expressed in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). Pet. App. A3. The court of appeals affirmed the dismissal, stating that, although it was "not unsympathetic with [petitioner's] plight," under the circumstances petitioner's sole remaining remedy was an action against his attorney. *Id.* at A1-A2.

ARGUMENT

Under the statute of limitations applicable to the ADEA, 29 U.S.C. 626(e), an aggrieved employee must file a judicial action within 90 days after receiving notice of the final decision of the EEOC. Petitioner received notice of the EEOC's final decision denying his administrative claim on or before September 23, 1993. Pet. 3. Accordingly, petitioner's deadline for filing an action under the ADEA was December 22, 1993. Petitioner's complaint was not filed until July 8, 1994. Pet. App. A11.

It is undisputed that petitioner's suit was not timely filed. The only question is whether the failure of petitioner's counsel to file a complaint, after assuring petitioner that he would do so, provides a basis for tolling the limitation period. The lower courts held that equitable tolling would not be proper in this case.

In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), this Court ruled that the statute of limitations in Title VII of the Civil Rights Act of 1964 is subject to equitable tolling. The Court also held, however, that the statute should not be tolled on the facts of *Irwin* itself, in which the employee's counsel did not file a complaint until after the expiration of the limitation period. The Court stated that, although equitable tolling may be appropriate "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing a filing deadline to pass," the Court has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

In this case, as in *Irwin*, neither petitioner nor his attorney filed a discrimination complaint within the prescribed period. Although petitioner argues that he should not be penalized for the default of his counsel, "[u]nder our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent." *Irwin*, 498 U.S. at 92. See also *Murray* v. *Carrier*, 477 U.S. 478, 488, 492 (1986); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). A discrimination plaintiff ordinarily cannot avoid the requirement that he actively pursue his remedies and employ due diligence in protecting his legal rights by asserting that his attorney failed to protect his rights. See *Gilbert* v. *HHS*, 51 F.3d 254, 257 (Fed. Cir. 1995); *Edwards* v.

Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).[1]

Petitioner relies (Pet. 6) on cases such as *Carter* v. *City of Memphis*, 636 F.2d 159 (6th Cir. 1980), and *Hassenflu* v. *Pyke*, 491 F.2d 1095 (5th Cir. 1974). The issue in those cases, however, was whether dismissal of a case was the appropriate sanction for counsel's failure to comply with court orders governing discovery and other deadlines.[2] In those cases, the courts of appeals noted that district courts have available a variety of sanctions to punish the failure to abide by court orders, and concluded that the severe sanction of dismissal should be reserved for the most extreme cases. The usual consequence of the failure to file an action within a period prescribed by a statute of limitations, however, is dismissal of the case. Equitable relief from that consequence is to be afforded "only sparingly," and not in "garden variety" cases of neglect. *Irwin*, 498 U.S. at 96. See also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984).

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[1] Petitioner relies (Pet. 6) on *Volk* v. *Multi-Media, Inc.*, 516 F. Supp. 157 (S.D. Ohio 1981), in which the court concluded that the failure of the plaintiff's counsel to present a discrimination charge within the prescribed time provided a basis for equitable tolling of the statute of limitations. *Id.* at 162. As the district court in this case recognized, however (Pet. App. A3), *Volk* is not consistent with this Court's subsequent formulation of the principles of equitable tolling in *Irwin*.

[2] In *Carter*, the court also noted that, although all attorney misconduct might not support dismissal of a client's action, a complete "failure to prosecute" would do so. 636 F.2d at 161.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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